IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOSE MALAGON-RAMIREZ,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

No. 22588

Appeal from the United States District Court
for the Southern District of California
Honorable Fred Kunzel, District Judge

APPELLANT'S OPENING BRIEF

LANGFORD, LANGFORD & LANE
By J. PERRY LANGFORD
439 Spreckels Building
San Diego, California 92101

Telephone: 232-1053

Attorneys for Appellant

SUBJECT INDEX
(Rule 18-2(a))

TABLE OF AUTHORITIES CITED
(Rule 18-2(a))

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOSE MALAGON-RAMIREZ, No. 22588

Appellant.

vs.

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court

for the Southern District of California

Honorable Fred Kunzel, District Judge

APPELLANT'S OPENING BRIEF

JURISDICTION
(Rule 18-2(b))

Appellant was indicted in the United States District Court for the Southern District of California in a four count indictment. Count One charged that he knowingly imported approximately one ounce of heroin in violation of United States Code, Title 21, Section 174. Count Two charged that he knowingly concealed and facilitated the transportation and concealment of the heroin. Count Three charged that he smuggled approximately seventy pounds of marijuana into the United States in violation of United States Code, Title 21, Section 176(a). Count Four charged that he knowingly concealed and facilitated the transportation and concealment of the marijuana. (R. 2-5). He was found

guilty by a jury on all four counts and committed to the custody of the Attorney General for imprisonment for a period of seven years on each count to run concurrently. (R. 21, 24). The District Court had jurisdiction under United States Code, Title 18, Section 3231. This Court has jurisdiction to review the judgment of conviction under United States Code, Title 28, Section 1291.

STATEMENT OF THE CASE
(Rule 18-2(c))

As heretofore set forth, appellant was charged in a four count indictment with smuggling, concealing, and facilitating the transportation and concealment of approximately one ounce of heroin and seventy pounds of marijuana in violation of United States Code, Title 21, Sections 174 and 176(a). (R. 2-5). He pleaded not guilty and was tried before a jury. (R. 10, 19-20). His motion for judgment of acquittal made at the conclusion of the Government's case was denied. (R. 19, R.T. 35). The jury returned verdicts of guilty as to all four counts. (R. 21). The court adjudged that the defendant be committed to the custody of the Attorney General for imprisonment for seven years on each count, to run concurrently. (R. 24).

Evidence

On February 15, 1967, appellant, Jose Malagon-Ramirez, entered the United States by automobile from Mexico through the Port of Entry at San Ysidro, California. (R.T. 4). Customs Inspector Charles Trumble became suspicious because the arm rests were missing from the car and a rear window would not roll down. He removed appellant from the vehicle, took him to the Customs office, where he seated him in a chair, returned, searched the vehicle, and discovered about seventy pounds of marijuana concealed behind a panel in the rear of the vehicle. (R.T. 5-6, 14-15, 17).

The vehicle was subsequently impounded in the customs impound lot. About a month later marijuana debris was noticed under the car, and further search of the vehicle disclosed another approximately seventy pounds of marijuana concealed in a special compartment built under the trunk. (R.T. 17-19).

When Inspector Trumble took appellant to the Customs Office, he left him seated in a chair approximately one and one-half to two feet from the desk where the customs inspector working in the office sits. (R.T. 6). Customs Inspector Lee Price was sitting in front of the desk. (R.T 32-33). The chair was the only one in the vicinity, and no other people were sitting near by. (R.T. 6). A great number of people go in and out of the office. It is quite likely that someone else had sat on the chair previously. The Inspector was not concerned with who had sat on the chair. (R.T. 11).

Inspector Trumble then took the appellant to a search room where he made a personal search. (R.T. 6, 12). As they got to the search room appellant for the first time began to appear nervous. (R.T. 12). The search revealed nothing, and appellant was taken to a holding cell. (R.T. 6, 13).

When Inspector Trumble returned to the office, he noticed a rubber contraceptive lying on the floor between the chair where appellant had been sitting and the desk,

about six inches from the chair and a foot to fourteen inches from the desk. (R.T. 7, 13). The contraceptive contained heroin. (R.T. 7, 15-16). Customs Inspector Lee Price did not testify. (R.T. 1).

Appellant was interviewed by a Customs Port Investigator. (R.T. 20). Appellant denied any knowledge of the marijuana or the heroin. (R.T. 23). He stated that he was making a trip to the United States with a Mr. Padilla to look for a stove, as he had done on a previous occasion. Mr. Padilla suggested that he drive the automobile across the border, while Padilla went to the bus station near by to seek riders to help defray the expense of the trip. (R. T. 21-23). When asked about ownership of the vehicle, appellant referred the investigator to the registration certificate. (R.T. 26). From the information given by appellant customs officials were able to locate neither appellant's wife nor Mr. Padilla. (R.T. 23-25). Neither could they find the person to whom the automobile was registered. (R.T. 25). Appellant appeared to the investigator to be consistent in his answers and not to be nervous. He was very cooperative. (R.T. 27).

Questions Involved

1. Was the circumstantial evidence of appellant's possession of the heroin found under the chair adequately sufficient to enable a reasonable determination that it excludes every hypothesis except that of guilt?

2. Was appellant deprived of the benefit of the presumption of innocence by instructions that, "there is nothing peculiarly different in the way a jury is to consider the proof in a criminal case from the way in which all reasonable persons treat any question depending upon evidence presented th them", and that, "if the accused is guilty, say so; if not, say so."? (R.T. 83)

SPECIFICATION OF ERRORS
(Rule 18-2(d))

1. Appellant's contention regarding the insufficiency of the circumstantial evidence as to the possession of the heroin is predicated upon the erroneous denial of appellant's motion for acquittal made at the conclusion of the Government's case. (R. 19, R.T. 35). The proceedings were as follows:

> "MR. GILLIS; I am not sure of the correct Federal procedure, but I would like to make a motion for dismissal on the second charge of transporting the heroin. I don't feel that the Government has sustained the burden.
>
> "THE COURT: You mean a judgment for acquittal. You don't have the form after five years.
>
> "The motion will be denied."

(R.T. 35).

2. Appellant contends that the trial court erred in its charge to the jury on the subject of reasonable doubt. The instructions as to the definition of reasonable doubt were as follows:

> "A defendant in a criminal action is presumed to be innocent until the contrary is proved and in case of a

reasonable doubt whether his guilt is satisfactorily shown, he is entitled to an acquittal. The effect of this presumption is to place upon the Government the burden of proving him guilty beyond a reasonable doubt.

"Reasonable doubt is defined as follows. It is not a mere possible doubt because everything relating to human affairs and depending on moral evidence is open to some possible or imaginary doubt. It is that state of the case which, after an entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge." (R.T. 75-76).

* * * * * *

"There is nothing peculiarly different in the way a jury is to consider the proof in a criminal case from the way in which all reasonable persons treat any question depending upon evidence presented to them.

"You are expected to use good common sense. Consider the evidence for only those purposes for which it has been admitted and give it a reasonable and fair construction in the light of your common knowledge of the natural tendencies and inclinations of human beings. If this accused is guilty, say so; if not, say so." (R.T. 83).

Trial counsel made no objection to the instructions as given. (R.T. 85).

ARGUMENT
(Rule 18-2(e))

Summary

The circumstantial evidence of appellant's guilt of the heroin charges was insufficient to support the conviction, in that it failed to exclude the reasonable hypothesis that the heroin was left on the floor of the Customs Office by someone other than appellant. No evidence whatever was introduced to exclude the possibility that the heroin was already on the floor when appellant was brought to the office, or that it was left there by someone else, while appellant was being searched. The government failed to produce as a witness the customs inspector who its evidence indicated was in the office at the times in question. The error in denying appellant's motion for acquittal on the heroin counts prejudiced him as to all four charges, because the jury's erroneous determination that the evidence supported the conclusion that he had left the heroin in the Customs Office necessarily influenced their further determination that he knew that the marijuana was in the automobile.

The trial court's initial instructions as to the definition of reasonable doubt were legally sufficient, but adequate instructions are difficult to frame and even adequate instructions are difficult for juries to understand. The concluding remarks of the court on the subject

were much easier to understand, but they conveyed the impression that the jury may apply the same standard to determination of guilt as it would in determining, e.g., whether to buy a particular stock. By limiting the jury to the choice between guilt and innocence, the court distracted their attention from the Scotch verdict, "not proven", and invited resort to the standard of the preponderance of the evidence. Trial counsel made no objection to the form of the instructions, so the question must be reviewed as plain error. (R.T. 85).

I

THE CIRCUMSTANTIAL EVIDENCE AS TO THE HEROIN CHARGES DOES NOT SUPPORT APPELLANT'S CONVICTION, BECAUSE IT IS INSUFFICIENT TO ENABLE A REASONABLE DETERMINATION THAT IT EXCLUDES THE HYPOTHESIS THAT SOMEONE OTHER THAN APPELLANT LEFT THE HEROIN IN THE CUSTOMS OFFICE BEFORE APPELLANT ARRIVED OR WHILE HE WAS BEING SEARCHED.

In DAVIS vs. UNITED STATES, 9th Cir. 1967, 382 F.2d 221, the day after the defendant had been transported in a sheriff's vehicle, heroin was found in the seat where she had been sitting. The evidence was held insufficient to support her conviction of having knowingly concealed and facilitated the transportation and concealment of the heroin Although the deputy sheriff had examined the automobile before the defendant was transported, and he testified in detail as to its use from the time the defendant was transported until the heroin was found, the evidence did not totally exclude the possibility that the heroin had come into the vehicle before or after the defendant was transported.

The case at bar is squarely governed by the reasoning in DAVIS. There are, of course, factual differences. The difference faborable to the government is that the time interval between the presence of the defendant and the discovery of the heroin was shorter in DAVIS than it was here. Other differences tend to favor appellant. Here the Customs Office was open to the public, including members thereof who

might be motivated to jetison contraband, whereas in DAVIS the sheriff's vehicle was not. In DAVIS the place in which the contraband was found had been examined before Davis was brought to it. Here, Inspector Trumble testified that he had no concern with who might have used the chair before. (R.T. 11). In DAVIS the custodian of the place in which the heroin was found testified in detail as to events during the times at which the heroin could have been placed there. Here, Inspector Lee Price, who worked at a desk located less than two feet from the place where the heroin was found, was not called to testify as to what opportunities, if any, there were for others to have left the heroin where it was found. In the light of these circumstances, appellant submits that the evidence excluding the possibility of innocence is much weaker here than it was in DAVIS, and that the conviction must therefore be reversed.

The failure to grant appellant's motion for acquittal as to the heroin count was prejudicial as to all four counts. Appellant's defense on the marijuana charges was that he did not know that the marijuana was in the vehicle. If the jury believed that he had dropped some heroin in the Customs Office, it was of course exceedingly unlikely that they would believe that he did not know that the marijuana was in the automobile. Since the jury did erroneously conclude that appellant dropped the heroin, as is evidenced by their verdicts on the heroin charges, they

must have been prejudiced as to the marijuana counts. Therefore, the judgment must be reversed as to all four counts.

II

THE TRIAL COURT ERRED IN ITS INSTRUCTIONS ON REASONABLE DOUBT, BECAUSE THE LIMITATION TO A CHOICE BETWEEN GUILT AND INNOCENCE OMITS THE AREA IN WHICH GUILT IS PROBABLE, BUT REASONABLE DOUBT HAS NOT BEEN ELIMINATED, AND BECAUSE IT IS NOT TRUE THAT APPLICATION OF THE STANDARD OF PROOF BEYOND A REASONABLE DOUBT IS THE WAY IN WHICH ALL REASONABLE PERSONS TREAT ANY QUESTION DEPENDING ON EVIDENCE PRESENTED TO THEM.

In HOLLAND vs. UNITED STATES, 348 U.S. 121, at 140, 99 L.ed. 150, 75 S.Ct. 127, the Supreme Court said:

> "Even more insistent is the petitioners' attack, not made below, on the charge of the trial judge as to reasonable doubt. He defined it as 'the kind of doubt. . .which you folks in the more serious and important affairs of your own lives might be willing to act upon.' We think this section of the charge should have been in terms of the kind of doubt that would make a person hesitate to act, see (citation), rather than the kind on which he would be willing to act. But we believe that the instruction as given was not of the type that could mislead the jury

into finding no reasonable doubt when in fact there was some. A definition of a doubt as something the jury would act upon would seem to create confusion rather than misapprehension. 'Attempts to explain the term "reasonable doubt" do not usually result in making it any clearer to the minds of the jury' (citation), and we feel that, taken as a whole, the instructions correctly conveyed the concept of reasonable doubt to the jury."

The charge of the trial court in the case at bar on reasonable doubt is set forth above at pages 7 to 9. Appellant submits that it is more prejudicial than that in HOLLAND. The HOLLAND charge referred to acting upon a doubt, a concept likely to be confusing, but therefore unlikely to induce the jury to act in the case in an improper manner. Here the trial court clearly told the jury that they might find the defendant guilty, if they were as satisfied of his guilt as they would be with regard to any question depending upon evidence presented to them. Thus, a juror was authorized to find the defendant guilty, if he was as satisfied of guilt as he was that the price of the stock in which he had invested the week before was going to

go up rather than down. Such an instruction is not confusing. It is just prejudicially wrong.

The second error in the instructions was in giving the jury the choice of guilt or innocence. There are, of course, three possibilities in a criminal case. (1) The jury is convinced of guilt beyond a reasonable doubt. (2) The jury is convinced of innocence. (3) The jury thinks that the defendant is guilty, but there remains a reasonable doubt, i.e., the Scotch verdict -- "not proven". The court's charge distracted the jury's attention from this third vital possibility, which was omitted by inviting the jury to say whether the defendant is guilty or innocent, and which reasonable persons frequently do not consider, when deciding questions depending upon evidence presented to them.

Appellant of course recognizes that the HOLLAND case ended in affirmance rather than reversal. As we have said, the error here was far more prejudicial than that in HOLLAND. Moreover, the case at bar was tried long after the Supreme Court had announced its decision in HOLLAND. This, we submit, is a factor to be considered in determining the proper disposition of a case involving a more aggravated form of the same type of error.

CONCLUSION

The trial court erred in denying appellant's motion for acquittal as to the heroin charges, because the circumstantial evidence was insufficient to exclude innocence. This error was prejudicial as to the marijuana charges as well. The trial court also erred in its explanation of reasonable doubt to the jury. For these reasons, the judgment should be reversed.

Respectfully submitted,

LANGFORD, LANGFORD & LANE

By_____
J. Perry Langford

Attorneys for Appellant

CERTIFICATE
(Rule 18-2(g))

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19, and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

J. Perry Langford